



Paper No. 10

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Suite 215  
2151 Alessandro Drive  
Ventura, CA 93001**COPY MAILED****FEB 13 2003****OFFICE OF PETITIONS**In re Application of  
Cheiky, et al.  
Application No. 10/022,450  
Filed: December 16, 2001  
Attorney Docket No. 968-20-022:  
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DECISION DISMISSING  
PETITION  
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This is a decision on the "Renewed Petition for Corrected Filing Receipt" filed October 25, 2002, requesting that the above-identified application be accorded a filing date of December 14, 2001, rather than the presently accorded filing date of December 16, 2001<sup>1</sup>. This petition is properly treated under 37 CFR § 1.10(d).

Petitioner maintains that the above-identified nonprovisional application was deposited in the United States Postal Service (USPS) Express Mail Service on December 14, 2001, in accordance with 37 C.F.R. § 1.10, and thus, is entitled to a filing date of December 14, 2001. On initial petition, petitioner submitted the following evidence: a copy of the application transmittal bearing the "Express Mail" mailing label number, EL307478544US; a copy of "Express Mail" mailing label EL307478544US, showing a "date-in" of December 16, 2001; copies of the "Express Mail" mailing labels for two related applications showing a "date-in" of December 14, 2001; copies of the three letters reporting the filing of the three related applications purportedly mailed to the assignee on December 14, 2001; and the declaration of facts of patent attorney Marvin Jacobs.

The evidence was considered, but not found persuasive to show that the requested filing date of December 14, 2001 was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day<sup>2</sup>. Both the "date-in" on the "Express Mail" mailing label and

<sup>1</sup> On initial decision on petition mailed October 11, 2002, the application was accorded a filing date of December 16, 2001, rather than December 17, 2001.

<sup>2</sup> Paragraph (a) of 37 C.F.R. § 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a) (Emphasis supplied).

the "USPTO's USPS Express Mail Information Database showed that the package mailed under this "Express Mail" number was accepted by the USPS on December 16, 2001, not December 14, 2001. Petitioner's other evidence was not found to be corroborating of their claim of deposit on December 14, 2001 within the meaning of § 1.10(d)(3). Petitioner also did not make a showing that the instant petition was filed promptly within the meaning of § 1.10(d)(1).

On instant request for reconsideration, petitioner has shown diligence in promptly filing this petition.

However, petitioner still has not shown to the satisfaction of the Commissioner, that the requested filing date of December 14, 2001 was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. 37 CFR § 1.10(d)(3) sets forth the corroborating evidence required. Petitioner has not provided the evidence required by the rule.

In support of their assertion that the application was deposited in "Express Mail" service on December 14, 2001, petitioner again submitted a declaration of Marvin E. Jacobs, stating that he deposited this application at the same time, on the same day as two other applications accorded a filing date of December 14, 2001. Further, he declares that he did not work on December 15, 2001 or December 16, 2001. In addition, a declaration of Linda Arnold was submitted. Ms. Arnold declares that the checks written in the instant application had consecutive numbers and were earlier in number than the checks written for the filing fees in the two-related applications. Further, all the checks for the three applications were written on December 14, 2001 and were posted to the client's accounts (by the instant law firm) on December 14, 2001. Petitioner also submitted copies of the patent mailing log maintained in the office of Marvin E. Jacobs, showing an entry

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Paragraph §1.10(d) provides that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

for mailing referencing docket No. 968-20-022; a letter dated January 22, 2002 to the assignee, noting an error in the filing date for this application; and a letter sent to practitioners by then Commissioner for Patents Nicholas Godici.

Considering all of the evidence, it is concluded that petitioner still has not made the showing required pursuant to § 1.10(d)(3) to accord the application a filing date of December 14, 2001. Petitioner has not submitted the type of corroborating evidence, outlined in 37 CFR § 1.10(d)(3). Neither the according of a filing date of December 14, 2001 in the other applications, or the numbering of or date of posting of checks internally in the law firm's Office shows that this application was deposited in the "Express Mail" service on December 14, 2001. Likewise, Mr. Jacobs statement that he deposited the papers and he worked on the 14th but not on the 15th or 16th is insufficient to make the required showing in light of the "date-in" on the "Express Mail" mailing label and the "USPTO's USPS Express Mail Information Database showing that the package mailed under this "Express Mail" number was accepted by the USPS on December 16, 2001, not December 14, 2001.

Postal employees are presumed to discharge their duties in a proper manner. Charlson Realty Co. v. United States, 690 F.2d 434, 442 (Ct. Cl. 1967). Therefore, it is petitioner's burden to establish their contention that the December 16, 2001 "Date-In," rather than a December 14, 2001 "Date-In," on the "Express Mail" label and in the "Express Mail" database is the result of an error on the part of an employee of the U.S. Postal Service. Petitioner has provided no evidence from the USPS acknowledging an error in entering the "date-in" or date of acceptance, or otherwise, in processing this "Express Mail" package. Petitioner states that December 16, 2001 was a Sunday, and thus, "How can the Express Mail label be correctly dated December 16, 2001 if there was no pick up on that day?" This argument would be persuasive if supported by an official and specific corroborating statement from the USPS. (i.e., acknowledging that this package was accepted at the 2100 Alessandro Drive location and that no packages are accepted on Sundays at that location and thus, the date must be December 14, 2001, rather than December 15, 2001). Otherwise, it is conjecture.

Further, the log submitted by petitioner is not of the type found corroborative within the meaning of § 1.10(d)(3). It is unclear whether the log came into being after deposit and within one day after the deposit of the correspondence as "Express Mail." The log does not include the date and time of the log entries. In addition, although the log contains the application docket number, it does not contain information such as the "Express Mail" number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; and the depositor's initials or signature. This log is not a log corroborating deposits of correspondence into the USPS Express Mail service.

The letter to practitioners from then Commissioner for Patents Godici generally discusses delays in receiving mail at the USPTO (i.e., the volume of backlogged). This letter does not cite errors by the USPS in entering "date-ins." In fact, by separate notice, then Commissioner Godici reassured applicants that mail properly deposited with the USPS under the provisions of § 1.10, no matter how delayed in being received in the Office would be accorded the date of deposit as the date of filing and thus, the date of filing of such a paper would not be impacted by the mail delay. See *Processing of, and Requirements for, the Filing of Duplicate Applications and Papers in Patent Applications in view of USPS Mail Delays*, 1254 OG 92 (January 15, 2002) ("In addition,

correspondence will be treated as filed (37 CFR 1.10) or timely (37 CFR 1.8), if applicant originally filed under those provisions regardless of the length of time that the correspondence took to reach the Office."). Given such notices and petitioner's acknowledged awareness of mail delays, at this time, petitioner should have been more diligent in complying with the provisions of § 1.10 where the date of deposit was critical.

In this regard, petitioner's attention is directed to 37 CFR 1.10(b), which states, in part, that:

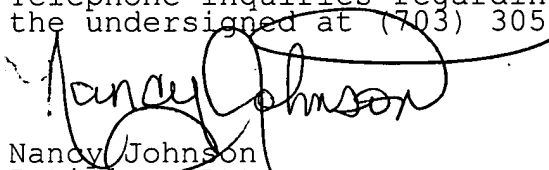
Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked.

It is unfortunate that applicants chose to deposit a paper as important as a patent application in "Express Mail" without immediately obtaining an Express Mail receipt showing the desired date of deposit.

The petition is dismissed. A two (2) month nonextendable period is set for reply. See §1.181(f).

The application with a filing date of December 16, 2001, is being forwarded to Technology Center 2838 for examination in due course.

Telephone inquiries regarding this matter should be directed to the undersigned at (703) 305-0309.

  
Nancy Johnson  
Petitions Attorney  
Office of Petitions